

INSIDE *A*LEC

A PUBLICATION OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

FEDERALISM EDITION

JANUARY / FEBRUARY 2014

Washington's Highway Robbery

By the Honorable Tom Graves, GA (CD-14)

Solving the STEM Challenge Requires Rethinking Schools, Teaching

By Frederick M. Hess, American Enterprise Institute

Four Persistent Myths About Pension Reform

By Will Freeland and Jonathan Williams,
Center for State Fiscal Reform

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Bill of Rights, Amendment X



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The Council provides legislators
with viewpoints and discussions on
issues important to them and their
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BY ROSS GARELICK BELL, MRGB CONSULTING



Dear fellow state legislators,

In Federalist No. 45, James Madison explained the Founders' concept for the new system of American government when he wrote, "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite."

Unfortunately since that time, the federal government has grown exponentially both in size and reach, while powers left to the states to resolve local issues have been severely limited.

The Founders understood people were better served if laws affecting their lives and liberties were handled by state and local governments, rather than a distant, out-of-touch federal bureaucracy.

The idea that local community members should make decisions for the communities and states is still popular among Americans. With federal government overreach at an all-time high in our healthcare and education systems and in every corner of our economy, now is the time for state lawmakers to create balance and work on local solutions that assert state sovereignty. As state legislators, we can take action and work collaboratively with our counterparts across the country and in Washington, D.C., to create a government that better serves the people.

In December, ALEC released "Restoring the Balance of Power: Thirteen Proposals to Return Sovereignty to the States," to provide state policymakers the tools to restore the proper balance of power and return to the federalist system intended by the Constitution.

Now is the time to take action and preserve our individual freedoms and the sovereignty of our states.

Sincerely,

Representative Linda Upmeyer
Iowa (HD – 54)
2014 ALEC National Chair

LOCAL DECISIONS, LOCAL CONTROL

- **Overhauling Healthcare**
- **State Energy Solutions**
- **State vs. Federal Spending**
- **Unfunded Federal Mandates**
- **Reestablishing Separation of Powers**
- **Restore Transportation to State Control**

The role of the states and the federal government has been grossly distorted from the vision held by our Founding Fathers. The Founders intended the states to serve as a check against the federal government, which they largely did until the New Deal. The federal government has grown exponentially during the last few decades, taking more authority from the states while handing down an increasing number of mandates.

It is incumbent on state lawmakers to restore the proper balance of power between the states and the federal government. The federal government has proven itself unwilling to relinquish power, and through legislation and resolutions, state legislators have the tools at their disposal to restore state sovereignty.

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RESTORING THE BALANCE OF POWER

THIRTEEN PROPOSALS

TO RETURN SOVEREIGNTY TO THE STATES

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Objectives for States Before and After EPA Proposes CO₂ Regulations

BY THE HONORABLE CHUCK MARTIN, GA (HD-49) AND
MICHAEL WHATLEY, CONSUMER ENERGY ALLIANCE

The United States Environmental Protection Agency (EPA) and the *Clean Air Act* were designed by Congress with the intention that states would be considered first among equals. State legislators can play an important role as the EPA develops guidelines for state carbon dioxide (CO₂) performance standards for existing power plants under the *Clean Air Act*. In 2013, the EPA engaged state officials and other stakeholder groups by soliciting ideas for reducing CO₂ emissions from existing power plants in advance of the June 1, 2014 deadline imposed by President Obama. The EPA is conducting listening sessions, state surveys and other communications to develop this forthcoming regulation and ALEC members should actively participate.

EPA efforts to reduce emissions should be based on the legal requirements of the *Clean Air Act* and should not usurp the primacy of states on the issue of environmental protection. Forthcoming regulations should reflect the electric power sector's contribution to overall greenhouse gas emissions in the U.S. and should not result in electric customers taking on the cost of emissions reductions for other sectors of the energy system.

The following is a list of objectives the EPA should consider when developing regulations to reduce emissions from fixed sources:

- **Maintain the generating fleet that powers America.**

The electric generating fleet in the U.S. is undergoing rapid change. These changes will only accelerate over time, as significant numbers of coal-fired power plants will be retired as a result of increased environmental requirements. The regulatory framework must recognize these changes and maintain the integrity of the remaining generating infrastructure, the majority of which is composed of fossil-fueled generation. Coal- and gas-fired power plants are reliable, provide power when intermittent renewable sources cannot, employ large numbers of people, and contribute significant amounts of money to communities. These plants are the lynchpin of a strong and robust industrial economy and will only become more important as the economy continues to slowly rebound.

- **Respect the primacy of the states.**

As required by the *Clean Air Act*, states have the primary responsibility of developing CO₂ requirements for existing power plants. Each state must therefore have wide latitude in how it implements the performance guidelines established by the EPA; these include establishing compliance deadlines that reflect the economic and energy needs of the state and other site-specific factors.

- **Base EPA guidelines on reductions achievable at the source.**

The CO₂ guidelines should be based only on those CO₂ emissions reduction measures that can be applied within the “fence-line” of the affected power plant, factoring in technology availability and cost. The EPA cannot require states to set performance standards based on fundamentally changing the nature of the source, mandating a different mix of generating resources, or mandating energy efficiency or other programs that depend on actions “outside the fence.” States also should not be required to achieve a level of reductions that is only available through fuel switching from coal to natural gas or other such extreme control options that may be technically available within the fence, but would have major adverse impacts on reliability, capacity and energy, or cost of service.

The EPA cannot require states to set performance standards based on fundamentally changing the nature of the source, fuel switching from coal to natural gas or other such extreme control options.

- **Establish performance standards based upon adequately demonstrated systems that are fuel and technology specific.**

The performance standards should be based only on those control measures that have been adequately demonstrated and take into account the relevant statutory factors, such as the cost of achieving the reductions and energy requirements. Those control measures will generally be site-specific energy efficiency measures to improve the heat rate and lower CO₂ emissions at the plant. In setting these energy-efficiency performance standards, the EPA should subcategorize by fuel type and take into account a broad range of plant-specific factors, including generating technology, size, and age of the unit.

- **Provide credit for significant reductions already made or being made.**

In satisfying an EPA emissions reduction goal, states must be allowed to take into account the substantial CO₂ emissions reductions that already have occurred in the electricity generating sector since 2005, and which will continue to occur in the future. The EPA, for example, should allow states to recognize the significant CO₂ reductions resulting from power plant shutdowns that have resulted and are projected to occur as new environmental requirements are implemented, as well as reductions from state climate or renewable programs. Similarly, credit should be given for other measures utilities have undertaken that result in real CO₂ emissions reductions through energy efficiency improvements, fuel switching, and the increasing use of natural gas and renewable resources in their generating portfolios. In the case of many states, these reductions alone will result


in significant reductions in CO₂ emissions to below 2005 levels.

- **Be fair and equitable to electricity consumers.**

Any CO₂ standard applied to the electric utility sector should reflect that sector’s proportionate contribution to those national emissions and no more. Other sectors (e.g., transportation, industrial, etc.) account for the majority of CO₂ and about 2/3 of greenhouse gases emitted annually in the United States. Electricity customers, including lower- and middle-income consumers, are already paying for substantial additional pollution control costs as a result of other new EPA environmental regulations.

Needless to say, it is vital for the EPA to fully consider the complex issues raised in these first of a kind stationary CO₂ standards. ALEC

members (and other interested parties) must emphasize how important it is for EPA to establish guidelines that provide each state with sufficient flexibility to develop a plan that preserves the system of reliable and affordable electricity. Coming regulations will inevitably set precedents for later standards and will broadly affect all electricity customers.

The Task Force on Energy, Environment and Agriculture recently approved a new tool for legislators: a resolution calling for all EPA regulations to establish a balanced and reasonable regulatory framework that can be tailored to each state to address the unique characteristics of their energy infrastructure. Such frameworks would not force the premature shutdown of existing, well-controlled coal-fired power plants, but instead recognize the significant CO₂ reductions that have already occurred or will occur due to existing regulatory requirements, and should preserve the reliability and affordability of electric service. 



THE HONORABLE CHUCK MARTIN is currently serving his sixth term in the Georgia State House of Representatives, where he represents the 49th District. He currently serves as Chairman of the Budget & Fiscal Affairs Oversight Committee and is a member of the Energy, Utilities & Telecommunications Committee.



MICHAEL WHATLEY is Executive Vice President of the Consumer Energy Alliance.

The Perils and Promise of State Internet Policy

BY BERIN SZOKA, TECHFREEDOM

As state and local policymakers grapple with new digital trends, from Uber to Big Data, they're increasingly coming into conflict with key federal limitations on their ability to regulate the Internet. In general, we should be skeptical about government's ability to regulate the Internet smartly. But if any legislation is actually going to survive a court challenge, threading these needles is essential.

DORMANT COMMERCE CLAUSE

Under the Articles of Confederation, the federal government was powerless to remove barriers to trade between states. So the Constitution's Commerce Clause empowered Congress to regulate commerce "among the several States." This means states may not burden interstate commerce unless they can show that the local benefits from their law outweigh its burdens on interstate commerce.

Courts have struck down a number of state Internet laws because they violate the "Dormant Commerce Clause" (DCC): they effectively govern how people outside their borders use web sites and services. In a widely-cited decision, *American Libraries Association v. Pataki*, a federal district court struck down a New York law criminalizing online distribution of obscene content to minors. While states have a strong interest in protecting youth, it would not be "technologically or economically feasible" to limit the effect of New York's law to users in New York because websites could not accurately ascertain a user's age and location.

New York and other states, and cities like New York City, are trying to extend antiquated taxi regulations to Uber and hotel regulations to Airbnb. Incumbents are using regulators to block new competition; users are fighting back against regulatory capture. But it isn't a DCC problem: the problem isn't that Uber doesn't know where its customers are. Because laws that govern how web companies deliver offline services can generally be applied on a state-by-state basis, they won't violate the Dorman Commerce Clause.

But that's not true for most state laws affecting purely online activity. If a state law has avoided, or survived, a DCC challenge, it's generally because it requires only transparency. For example, a 2003 California law effectively requires websites to post privacy policies. Unlike Uber, websites generally can't tell which users are in California, so the law effectively applies to all websites—yet no one has ever challenged the law, primarily because the burden is relatively low. But a more specific requirement about the content of notice or how to present it probably would be challenged. Since multiple states could enact conflicting requirements, even state-level transparency requirements that seem sensible could be struck down on DCC grounds.

We may soon see where courts draw the line if there's a challenge

to California's recent amendment to its 2002 data breach notification law — which has long since been copied by nearly every state. Despite slight variations that make compliance tedious and not inexpensive, these laws haven't been seriously challenged on DCC grounds. The key reason is that the current laws apply only when a narrow category of personal information is breached—so sites can generally determine which state's requirements apply to which users.

The new amendment now requires sites to post public notifications when log-in information alone is breached. That's a good idea: it empowers users to protect themselves from a serious risk of losing other information by changing their passwords. But that doesn't mean it's constitutional: As the Supreme Court has said, "such requirements, if imposed at all, must be through the action of Congress, which can establish a uniform rule." Because log-in information isn't tied to a location, California's new rule will essentially apply to the entire Internet. That doesn't mean anyone will bother with the expense (and negative PR) of suing, but if they do, we may finally see just how far the courts will let states go in imposing idiosyncratic, web-wide disclosure requirements.

SECTION 230

In the mid-1990s, several court cases made websites liable for defamatory content published by users. While policing such content might work on the scale of newspapers and letters to the editor, Congress astutely realized that such responsibility would significantly deter the kind of interactivity that has defined "Web 2.0." So in 1996, Congress enacted Section 230, which bars holding the publishers of web sites, services, and apps liable for content created by their users except under federal intellectual property, criminal or privacy law.

State attorneys general have repeatedly tried to poke holes in this immunity in court, with little success. Generally, unless a website joins in creating illegal content, it won't be responsible for it. The AGs have responded on two fronts.

First, they've resorted to extra-legal pressure to coerce companies to change their practices in ways they couldn't legally require. Most notably, in 2008, state AGs browbeat MySpace into a "voluntary" agreement to perform an unprecedented degree of content monitoring. Some have speculated that the sheer amount of personnel resources spent on monitoring and compliance distracted MySpace from innovating even as Facebook was on the rise.

In 2009, South Carolina's Attorney General threatened criminal charges against Craigslist's management unless they shut down their "adult services" category. Craigslist asked a federal court to block such charges. The court said the request was premature, but legal experts agreed that Section 230 barred any state charges. South Carolina's AG gave up—yet, under enormous pressure from other states, Craigslist eventually caved anyway.



Second, state AGs have demanded the power to directly enforce federal criminal laws, such as concerning prostitution against online intermediaries like Craigslist—instead of focusing on enforcing their existing laws against actual child predators. Earlier this year, all but three state AGs signed a letter demanding that Congress amend Section 230 to allow them not only to enforce federal or even state prostitution laws, but to hold websites liable under any state law. This would mean that any of America's 27,000 state and local prosecutors could threaten to shut down any website because one of its users violated any of the thousands of idiosyncratic state laws on the books, including odd misdemeanors like selling spray paint to minors.

In September, ALEC firmly opposed the AGs' sweeping demands. It's unlikely Congress will ever take up the idea, which would prompt intense Internet opposition. But the fight is far from over.

THE POSITIVE AGENDA

What else should state legislators do? When it comes to new laws, they should keep in mind some simple rules:


1. To respect federalism, states shouldn't try to regulate the Internet in ways that can't clearly be limited to users within that state.
2. To respect Section 230, state legislatures will have to steer clear of any law that makes websites responsible for what their users do—and keep an eye on efforts by their attorneys general to circumvent Section 230.

Two specific reforms should top their positive agenda. First is ensuring that state laws protect us all from groundless, unrestrained snooping by prosecutors and even private lawyers acting as officers

of the court in civil matters like divorce. Congress is working on some of these issues, but only very slowly, and other issues, like seizures of electronic devices incident to arrest, are matters for each state to address.

Second, instead of trying to gut Section 230, the law that has made user-generated sites from eBay to AirBnB possible, states should enact the obvious corollary: just as the threat of liability under state law shouldn't be used to shut down lawful websites, it shouldn't be used to silence individual users who say truthful, but negative, things online. Some states have already enacted protections against what are generally called "Strategic Lawsuits Against Public Participation" but most haven't yet passed laws that protect not only journalists but also those who post comments or reviews online.

This isn't just a symbolic parallel: truthful, negative reviews are essential to the reputation markets that protect users on sites like Uber and AirBnB. They reward good service and punish bad service.

That's the future of consumer protection: more transparency and, yes, more data. 



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Solving the STEM Challenge Requires Rethinking Schools, Teaching

BY FREDERICK M. HESS, AMERICAN ENTERPRISE INSTITUTE

The United States has historically enjoyed astonishing success in science, technology, engineering and math (STEM). But, as other nations make dramatic educational gains and challenge American supremacy in technology, finance and research, our nation's continued success requires dramatic improvement when it comes to educating our youth in math and science.

While there has been a steady supply of proposals to improve STEM education, most do not do enough to upend the routines that hinder efforts to extend excellence. Today, American students routinely rank lower than 15 on international math and science assessments. Our high-achievers also lag; just 6 percent of American students score at the advanced level in math, well short of the international norm. The situation is no brighter in higher education. The National Academies reports that the United States ranks 27 among developed nations on the percentage of college graduates who earn a degree in science or engineering.

Tackling STEM more effectively is not just about better textbooks or mentoring for teachers; it requires deeper, more profound changes.

American students routinely rank lower than 15 on international math and science assessments.

The United States ranks 27 among developed nations on the percentage of college graduates who earn a degree in science or engineering.

Continued on page 31



Maybe It's Not Rocket Science?

BY JAMES BROWN, STEM EDUCATION COALITION

There has been a lot of talk—and some hand-wringing—about STEM (science, technology, engineering, and mathematics) education recently, much of it from the business and tech communities who are also quite vocal about the lack of skilled workers emerging from K-12 public education.

STEM fields support American innovation, which creates new jobs and keeps our country strong and prosperous. The idea that STEM skills are essential for students, regardless of their future career aspirations, is a fact of life. Yet research shows that more than half of graduating students are not prepared for the STEM workforce – or to start training as rocket scientists. Most are simply not ‘STEM literate.’

The Obama Administration, Congress and state leaders agree that federal programs to address STEM education must continue, but the path forward is not clear. Many federal and state agencies have long supported programs providing assistance to STEM education by sharing their technical expertise, scientific results, data collections and facilities.

There are currently more than 200 existing STEM programs across 13 federal agencies that cost American taxpayers more than \$3 billion. This represents only a tiny proportion of the overall national

spending on K-16 education, yet it provides a unique opportunity to leverage some much-needed capacity for our schools. Members of Congress from both political parties are concerned about the effectiveness and profusion of these programs. Most stakeholders believe the impact of these federal dollars can be increased. These programs also need to be better informed by the needs of states’ educators and school leaders.

This past spring the administration released a very ambitious federal budget proposal that reorganizes the federal STEM portfolio by eliminating and consolidating more than 100 existing programs, then re-purposing the funds to set up several major new STEM initiatives at the Department of Education, the National Science Foundation and elsewhere. However, the administration’s plan lacked crucial details and was produced with minimal critical input from STEM stakeholders, including those in the states. As an example, a major flaw in this plan was the lack of detail about how – or if – the missions of consolidated or eliminated programs would be incorporated into new STEM initiatives proposed at other agencies.

It is no surprise that scores of policymakers from both political parties and the STEM education community roundly rejected this plan.

While the administration’s plan likely will not succeed in its current form, it has focused attention on the important role federal agencies

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The Impacts of Raising the Minimum Wage

BY CARA SULLIVAN, TASK FORCE ON COMMERCE,
INSURANCE AND ECONOMIC DEVELOPMENT

Over the past year, fast food and retail workers around America have staged strikes to demand a minimum wage as high as \$15 per hour. These strikes helped reignite the contentious debate on the minimum wage at the local, state and federal levels.

Advocates of increasing the minimum wage cite the goal of raising individuals and families out of poverty; a worthy goal to consider when crafting public policy. However, not only does increasing the minimum wage fail to help the poor, but it also disproportionately hurts inexperienced, uneducated individuals by decreasing the employment opportunities available to them.

Economics dictates that if you increase the price of a good beyond the market clearing price, consumers will buy less of it. In the case of wage rates, assuming other factors constant, if you increase the price of hiring an employee, employers will hire less. Therefore, increasing the minimum wage is likely to decrease opportunities for employment—especially among low-skill, uneducated youths. Numerous academic studies have debated the relationship between increased minimum wage and employment, and the majority of research concludes that raised minimum wage has a negative effect on employment levels.¹


The first individuals to lose their jobs will be low-skill, and often young, workers. Negative employment effects may not be felt immediately, but as employers are spurred by higher labor costs to make labor-saving capital investments, the impact on low-skill workers will grow. The primary value of a low-paying job for many of these individuals is the training and experience the job provides, not their starting wage rate. Removing job opportunities robs these individuals of the crucial workplace experience needed to start careers and earn a higher wage later in life when they are more likely to be supporting families. More than 40 percent of these young earners are enrolled in school during non-summer months, and for 79 percent, it is a part time job.² For many young earners, their wages are supplemental spending cash, not household income.

Perhaps the possibility of fewer available employment opportunities would be more palatable if increasing the minimum wage actually helped impoverished Americans. However, the benefactors of an increase to the minimum wage—those who currently hold a job and earn the minimum wage—are more than likely not living in poverty nor supporting a family on minimum wages alone. Over half, 50.6 percent, of minimum wage earners are between the ages of 16 and 24, with an average annual family income of \$69,500.³ Of the adults 25 and older earning the minimum wage, 75 percent of them live above the poverty line and have an average family income of \$42,500 a year.⁴ Raising the minimum wage will primarily help teenagers lucky

enough to already have a job, not single parents supporting a family.

For the 11 percent of adults living in poverty and earning the minimum wage, increasing the wage rate does not effectively help them.⁵ Multiple studies have shown little to no relationship between a higher minimum wage and reductions in poverty. Minimum wage employees who receive more pay as a result of a mandated increase to the minimum wage can lose government benefits like the Earned Income Tax Credit (EITC) and food stamps, yet still not earn enough to move out of poverty. A New York University Law School study found that many potential beneficiaries of an increase to the minimum wage would face effective tax rates of up to 90 percent on their new wages.⁶

The problem plaguing America's poor is not that they earn a low wage, but that they do not work at all.⁷ To truly help the impoverished in America, policymakers should enact policies that expand economic opportunity and lower barriers to entry for employment.

Desire to help the nation's less fortunate spans the ideological spectrum. Unfortunately, evidence suggests that increasing the minimum wage is not an effective solution. 

1 Neumark, David and Wascher, William. "Minimum Wages and Employment: A Review of Evidence from the New Minimum Wage Research," National Bureau of Economic Research. November 2006. Available: <http://www.nber.org/papers/w12663.pdf>.

2 Sher, James. "Who Earns the Minimum Wage? Suburban Teenagers, Not Single Parents." The Heritage Foundation. February 28, 2013. Available: <http://www.heritage.org/research/reports/2013/02/who-earns-the-minimum-wage-suburban-teenagers-not-single-parents>.

3 *Ibid*.

4 *Ibid*.

5 Burkhauser, Richard V. and Sabia, Joseph J. "Minimum Wages and Poverty: Will a \$9.50 Federal Minimum Wage Really Help the Working Poor?" Southern Economic Journal. January 2010. p. 592–623.

6 Shaviro, Daniel. "Effective Marginal Tax Rates on Low-Income Households." Employment Policies Institutes. February 1999. Available: http://www.epionline.org/studies/shaviro_02-1999.pdf.

7 Sher, James. "Raising the Minimum Wage Will Not Reduce Poverty." The Heritage Foundation. January 8, 2007. Available: <http://www.heritage.org/research/reports/2007/01/raising-the-minimum-wage-will-not-reduce-poverty>.



CARA SULLIVAN is director of the Task Force on Commerce, Insurance and Economic Development for the American Legislative Exchange Council.



"What you are doing is to assure that people whose skills are not sufficient to justify that kind of wage will not be employed. Minimum wage law is most properly described as a law saying employers must discriminate against people who have low skills."

-Milton Friedman

Expanding Medicaid Threatens Oklahoma's Bright Future

BY THE HONORABLE TOM COBURN (OK) AND JONATHAN SMALL, OKLAHOMA COUNCIL OF PUBLIC AFFAIRS

Across the country, state policymakers are debating whether or not to implement the Affordable Care Act's Medicaid expansion. So far, Oklahoma's leaders have declined to expand Medicaid; a reasoned decision that we applaud.

However, proponents of Medicaid expansion in our state, such as hospitals and some businesses, argue the law includes "money on the table" for states, since under "Obamacare" the federal government says it would pay for 90 percent of the expansion population in perpetuity.

But a future Congress is not bound by current law; it can simply rewrite it. Congress has a history of overpromising funding for states, so it would be folly for states to build their budgets around a promise Congress is unlikely to keep.

In Washington, it's an "open secret" that Congress has to reduce Medicaid outlays. That's why virtually every major bipartisan plan includes recommendations to reduce the federal dollars given to states for Medicaid.

It's not like the federal government is exactly flush with cash. According to the Government Accountability Office, total governmental unfunded liabilities tally more than \$88 trillion. Even scarier, under generally accepted accounting principles, that number is closer to \$124 trillion. In this environment, a clear-eyed view of the future suggests Congresses will seek ways to curb Medicaid spending. In addition to Congress writing a check that will bounce, the federal government's promise to pay 90 cents of every dollar for a Medicaid expansion obscures real costs to states. This is like Uncle Sam fleecing the states by offering to give them a new product they realistically cannot afford, by offering the first few months for free.

The fact is Oklahomans already struggle to pay for the current Medicaid program in our state. According to data from the Oklahoma Health Care Authority, roughly one in four Oklahomans were enrolled in the program last year. When one out of four people are enrolled in Medicaid, state taxes have to be increased on the three remaining individuals outside the program, just to pay for it.

Based on last year's enrollment data, expanding the program could result in nearly one in three Oklahomans on Medicaid. Jagadeesh Gokhale, a member of the Social Security Advisory Board, estimates that could cost Oklahoma taxpayers \$1.6 billion the first ten years. By 2023, he projects Oklahoma's bill for Medicaid would come in at \$6.5 billion annually, a sum equal to the entire state appropriated budget in Fiscal Year 2012!

One important reason to not expand Medicaid in our state is that


doing so could threaten access to health care for the people who depend on the program. While Soonercare has above-average access to providers for patients on the program, nationally, about 40 percent of primary care physicians and about 65 percent of specialists do not even accept Medicaid patients. What good is it to offer Oklahomans health coverage if, in reality, they cannot access care in a timely manner? For too many Medicaid patients in other states, their care is routinely delayed and denied.

Before "Obamacare," some states already tried expanding Medicaid and nearly bankrupted themselves in the process. The state of Tennessee had an especially painful experience with its state Medicaid program, TennCare. The program nearly bankrupted the state and thousands of individuals were eventually cut from the rolls.

States like Maine and Arizona experienced cost overruns more than double their estimates, resulting in arbitrary program caps that displaced needy patients.

The lessons of history and the hard numbers are clear: It is not fiscally responsible or wise to expand a strained entitlement program and rely on federal funding that is unlikely.

While it has been tempting for some consultants and lawmakers to try and dress up Medicaid expansion as "program redesign," it is simply not in our state's long-term interest to expand Medicaid, whether that's under the guise of additional federal funding or creative program designs.

Rather than expand Medicaid, policymakers should work to mend Medicaid by pursuing reforms to better manage and coordinate care and promote medical price transparency. This can help create an environment in which the number of our fellow Oklahomans enrolled in Medicaid can be reduced, not increased. 



TOM COBURN is a U.S. Senator and a Muskogee physician who has cared for thousands of Medicaid patients. He specializes in family medicine, obstetrics, and the treatment of allergies. Dr. Coburn has personally delivered more than 4,000 babies.



JONATHAN SMALL, a certified public accountant, is vice president for policy of the Oklahoma Council of Public Affairs.

Forbes

Note: A modified version of this article appeared in *Forbes* on October 29, 2013.

Maine's Dangerous Drug Scheme

BY PAUL HOWARD, PH.D., MANHATTAN INSTITUTE

On October 9th, a law went into effect allowing residents and businesses in Maine to import drugs from approved pharmacies in Canada, the U.K., New Zealand and Australia. This is a bad law, unlikely to survive, and unwise in any case.

It's worth casting a glance at international drug pricing trends and strategies, since U.S. drug pricing remains a sore point at the state and federal level.

The U.S. is the only developed nation that doesn't apply price controls to prescription drugs. While actual drug price differences between the U.S. and other countries is probably oversold (and fluctuates), U.S. prices are undoubtedly higher than in countries with government controls. And many in the U.S. understandably bristle at paying some of the world's highest prices for new medicines.

But we can also look at the effects of alternate pricing and importation schemes in Europe to understand how similar programs are likely to play out in the U.S.

In the E.U., wealthy nations, where drugs are more expensive, do get access to cheaper drugs sourced from poorer countries like Greece through parallel trade. But because drug companies can control the supply of their products – sending just enough pills to Greece to treat Greek patients – parallel trade can result in drug shortages in poor countries. Pharmacists often sell drugs from their inventories (at a profit) to redistributors for re-sale in wealthy countries like the U.K. There's also significant evidence that fake and adulterated drugs have penetrated the European market, since there is no way to ensure the chain of custody for the thousands of distributors that operate legally in the E.U. And some of those fake drugs have already found their way into the U.S. from the U.K., including fake doses of the cancer drug Avastin.

Sourcing drugs only from Canada, the U.K., New Zealand, and Australia (as Maine's law tries to do) seems like a solution, but it won't be foolproof in practice. Counterfeiters have gotten so good at making knock-off medicines that it's challenging for even the drug's manufacturer (let alone pharmacies or distributors) to tell the difference between real and counterfeit pills outside of laboratory tests. And, again, because the manufacturers can control drug supply, neither Canada nor any other country could meet any significant percentage of demand for cheaper medicines in the U.S.—at least without sourcing drugs from much less closely regulated sources.


Drug importation – really a thinly veiled attempt at price controls – also undercuts incentives for R&D. While it can cost over \$1 billion to develop a drug that passes muster with the U.S. Food and Drug Administration, every pill after that costs pennies on the dollar. In short, the sunk costs of drug development are staggering, but the marginal



costs are extremely low. All of the value of the pill is in the science and the clinical data that allows regulators and doctors to prescribe the pill with confidence. And this is where patents come in. Strong intellectual property regimes help firms recoup the large fixed costs of R&D before a competitor is able to make a cheap generic version to undercut the innovator's investment and pricing.

Given the high financial risks required to bring new drugs to market, weakening patent protection through drug importation (thinly disguised price controls) reduces the long-term gains to public health from lost medical research far more than it saves in the short run on drug prices.

Rather than bemoaning the high cost of patented drugs, and importing them from abroad, policymakers should find ways to both encourage innovation and drive consumers toward the highest value health interventions—whether a pill (branded or generic), a better diet, or a gym membership.

This would encourage more competition across all health care providers, and a real focus on the total value delivered by the health care system—not just the price of any single component of care. Any other approach is apt to be penny-wise and pound foolish. 



PAUL HOWARD, PH.D., is a Manhattan Institute senior fellow and director of the Manhattan Institute's Center for Medical Progress. In 2012, Howard served on the Health Care Policy Advisory Group for the Romney presidential campaign and has testified twice before Congress. Howard is often quoted on health care issues and his columns and essays have appeared in national publications, including *Bloomberg View*, *The Wall Street Journal*, *National Affairs*, *USA Today*, *Real Clear Politics*, *New York Post*, *Investor's Business Daily*, *Health Affairs*, and *FoxNews.com*.

Kansas	Sam Brownback, R	2014	8	32				33	92		R		JAN 13	MAY 28	2014
Kentucky	Steve Beshear, D	2015	14	22	1		1	54	45	1	Split		JAN 7	APRIL 19*	2014
Louisiana	Bobby Jindal, R	2015	13	26				43	59	2	R		MARCH 10	JUNE 2	2014
Maine	Paul LePage, R	2014	19	15	1			89	58	4	D		JAN 8	APRIL 16*	2014
Maryland	Martin O'Malley, D	2014	35	12				98	43		D		JAN 8	APRIL 7	2014
Massachusetts	Deval Patrick, D	2014	36	4				130	29	1	D		JAN 1	JAN 6 ('15)	2014
Michigan	Rick Snyder, R	2014	12	26				51	59		R		JAN 8	DEC 31*	2014
Minnesota	Mark Dayton, D	2014	39	28				73	61		D		FEB 25	MAY 19*	2014
Mississippi	Phil Bryant, R	2015	20	32				55	64	3	R		JAN 7	APRIL 6	2014
Missouri	Jay Nixon, D	2016	10	24				53	110		R		JAN 8	MAY 30	2014
Montana	Steve Bullock, D	2016	21	29				39	61		R		NO '14 SESSION	—	2014
Nebraska	Dave Heineman, R	2014									UNICAMERAL-49		JAN 8	APRIL 22	2014
Nevada	Brian Sandoval, R	2014	11	10				27	15		D		NO '14 SESSION	—	2014
New Hampshire	Maggie Hassan, D	2016	11	13				218	179	3	Split		JAN 8	JULY 1	2014
New Jersey	Chris Christie, R	2017	24	16				46	34		D		JAN 14	JAN 12 ('15)	2014
New Mexico	Susana Martinez, R	2014	25	17				37	32	1	D		JAN 21	FEB 20	2014
New York	Andrew Cuomo, D	2014	31	27	5			105	42	3	D		JAN 8	JAN 7 ('15)	2014
North Carolina	Pat McCrory, R	2016	17	33				43	77		R		MAY 12	JULY 21	2014
North Dakota	Jack Dalrymple, R	2016	14	33				23	71		R		NO '14 SESSION	—	2014
Ohio	John Kasich, R	2014	10	23				39	60		R		JAN 7	DEC 31	2014
Oklahoma	Mary Fallin, R	2014	12	36				29	72		R		FEB 4	MAY 30	2014
Oregon	John Kitzhaber, D	2014	16	14				34	26		D		FEB 3	MARCH 9	2014
Pennsylvania	Tom Corbett, R	2014	23	27				92	111		R		JAN 7	NOV 30	2014
Rhode Island	Lincoln Chafee, D	2014	32	5	1			69	6		D		JAN 7	JUNE 23	2014
South Carolina	Nikki Haley, R	2014	18	28				45	78	1	R		JAN 14	JUNE 5	2014
South Dakota	Dennis Daugaard, R	2014	7	27		1		17	53		R		JAN 14	MARCH 31	2014
Tennessee	Bill Haslam, R	2014	7	26				27	71	1	R		JAN 14	APRIL 17	2014
Texas	Rick Perry, R	2014	12	19				55	95		R		NO '14 SESSION	—	2014
Utah	Gary Herbert, R	2016	5	24				14	61		R		JAN 27	MARCH 13	2014
Vermont	Peter Schumlin, D	2014	20	8	2			97	44	9	D		JAN 7	MAY 2	2014
Virginia	Terry McAuliffe, D	2017	20	20				33	67		Split		JAN 8	MARCH 9	2014
Washington	Jay Inslee, D	2016	27	22				55	43		Split		JAN 13	APRIL 4	2014
West Virginia	Earl Ray Tomblin, D	2016	24	10				54	46		D		FEB 12	APRIL 12	2014
Wisconsin	Scott Walker, R	2014	15	18				39	57	3	R		JAN 14	MAY 21	2014
Wyoming	Matt Mead, R	2014	4	26				8	52		R		FEB 10	MARCH 7	2014

State Tax Cuts Indicate Emphasis on Economic Growth

BY BEN WILTERDINK, CENTER FOR STATE FISCAL REFORM

The 2013 legislative session saw a strong trend of states cutting various taxes, as 18 states passed net tax cuts into law. When one-third of the country cuts taxes, it is clear economic growth is a top priority for states digging out of a dismal economy.

The cuts range from a nearly complete overhaul of a state's tax code to a few small changes. North Carolina enacted the year's biggest tax cut as part of a comprehensive reform package. The measures will be phased in over a period of several years, with taxes cut by \$500 million during the first two years, and the measure will continue to cut more than \$650 million per year by the 2017-2018 fiscal year. Without question, North Carolina's reforms are among the most significant tax relief any state has passed in the last decade.


At a time of seemingly endless budget battles, states have divided themselves into two distinct categories for solving funding issues:

- One group tends to reflexively raise taxes to cover budget shortfalls, which rarely results in achieving the revenues needed to fill the gaps. For example, Maryland has increased taxes and fees a total of 40 times since 2007 but still expects to face major budget shortfalls for years to come.
- The second group fills budget shortfalls by increasing economic growth and expanding the total tax base. Rather than drive up rates on a small number of overburdened taxpayers, these states create an environment where people and businesses flourish, which attracts more population and businesses to the state and allows it to grow revenue by virtue of having a larger population paying taxes.

It is this second group of states—many of which are highlighted in the *2013 State Tax Cut Roundup*—that leads the nation in enacting major tax relief measures and reaping the rewards of increased economic growth. Jimmy Johns Sandwiches announced it would be leaving Illinois and heading to Indiana or Texas, while Hertz rental cars moved its headquarters from New Jersey to Florida. Tax and fiscal policy decisions matter to businesses and the proof lies where old businesses move and new businesses start.

While not all tax cuts are created equal, studies from organizations ranging from the Tax Foundation to the Organization for Economic Cooperation and Development agree that taxes on capital and income are far more damaging to an economy than taxes on consumption. All taxes create a barrier between work and reward and tend to negatively affect economic growth at some level, but there is widespread agreement that taxes on income are among the worst for economic growth. Indeed, state-level economic data from the past 10 years proves this true.

The *Rich States, Poor States* annual report tracks the economic data and ranks the states' economic outlook based on 15 important policy variables. Over the last decade, population in the nine states with no personal income tax grew 150 percent more than their high-tax counterparts. The no-income tax states also saw their gross state product grow 40 percent more than their high-tax counterparts.

The data is clear: states with a lower tax burden are able to achieve higher rates of growth in almost every economic category. In the 2013 legislative session, 18 states received this message loud and clear. If the remaining 32 states desire to stay competitive, it is best they follow their low-tax, pro-growth counterparts. 



BEN WILTERDINK is a research analyst at the American Legislative Exchange Council's Center for State Fiscal Reform.

A map of the United States where states are colored either blue or light gray. Blue states include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Light gray states include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Legend: States enacting tax cuts



Washington's Highway Robbery

BY THE HONORABLE TOM GRAVES, GA (CD-14)

President Ronald Reagan once astutely noted, “No government ever voluntarily reduces itself in size. Government programs, once launched, never disappear. Actually, a government bureau is the nearest thing to eternal life we’ll ever see on this earth.”

Eternal life, indeed. One could even make the case that government bureaucracies tend to take on a life of their own. Decade after decade, federal programs—which government officials often promise will have a limited shelf life—continue to live on in perpetuity. They just don’t go away. Rather, federal programs demand more as taxpayers keep footing the bill, deficits continue to balloon and no one quite really knows what we’re getting in return for sending all that money to Washington.

Let’s take a moment and go back in time to look at one such example. The year: 1956. The location: The storied halls of Congress. The House Ways and Means Committee was debating what was considered to be a new and innovative project—the construction of a nationwide interstate system. The plan before Congress was simple: build six interstate highways; three highways to run north-south and three highways to run east-west.

Back then, the plan was to collect a federal gas tax of three cents per gallon for 16 years to pay for the whole project. In 1972, the tax was supposed to drop to 1.5 cents per gallon. Congressmen Hale Boggs and George Fallon even noted at the time that once the interstate system was built, there was no obligation for the government to continue imposing the tax on the American people. However, the tax never went away and it never dropped to 1.5 cents a gallon. Instead, the tax continued to increase. The federal government currently collects 18.4 cents for each gallon we pump into our tanks, not to mention the 12.4 to 53.2 cent motor fuel tax imposed by the states.

Further, the government is playing “Robin Hood” with 37 states, including my home state of Georgia. These states, called “donor states,” put in more money to the Highway Trust Fund than they receive from the federal government. For example, Georgia’s buying power in Fiscal Year 2014 is estimated to be approximately 84% of its trust fund contributions, costing Georgia taxpayers \$185 million. All told, donor states lost out on over \$5.6 billion.

In the process, federal lobbyists and earmarkers skim their share, federal mandates constrain how states spend the money, and over \$400 million per year fund the bureaucracy that manages road and highway construction in Washington. Millions more went to projects such as bike paths, walking trails and flower pots, which have noth-

ing to do with the maintenance of America's critical transportation infrastructure. For Fiscal Year 2014, \$820 million is authorized for "transportation alternatives" defined to include, among other things, landscaping, scenic beautification and transportation museums.

We now have an opportunity to end a massive federal bureaucracy and transfer that power back to states. States know best how

to cut commute time and improve the work-life balance. It's about helping the moms and dads who are frustrated with gridlock and just want some extra family time and opening access to more affordable suburban housing opportunities for someone who wants to take a job in the city.

When I was a state representative, I was proud to vote in favor of

No government ever voluntarily reduces itself in size. **Government programs, once launched, never disappear.** Actually, a government bureau is the nearest thing to eternal life we'll ever see on this earth.

-President Ronald Reagan

to serve their unique transportation needs. They can tackle projects more quickly and efficiently with Washington out of the way. Think how much time and money would be saved if states didn't have to wait on the federal collection and disbursement of motor fuel taxes, if taxpayer dollars stopped disappearing into federal bureaucracy, and if we eliminated Washington's misuse of highway funds for projects that have nothing to do with keeping America's transportation system operational.

I've partnered with Senator Mike Lee of Utah in authoring the Transportation Empowerment Act (TEA) to get rid of the Washington middle man. Our bill empowers states to control their own highway programs and strictly limits federal involvement to projects that have a national purpose. Over a five-year transition period, the federal gas tax would drop to 3.7 cents per gallon, which would let the states adjust their own gas tax rates and keep the subsequent revenue.

With states in the driver's seat, they can get about the business of using highway dollars to ease congestion and improve quality of life in high traffic areas. Indeed, at the heart of the TEA Act is the potential

Georgia's resolution on this issue, which passed with overwhelming bipartisan support. I am convinced that, as state officials learn about the legislation and the potential it has for their communities, and with an army of drivers who are ready for bold solutions to traffic issues, we can pass this important reform across America and improve many lives.



THE HONORABLE TOM GRAVES was elected to Congress in June 2010 after serving seven and one-half years in the Georgia General Assembly. He represents Georgia's 14th Congressional District, which stretches from the suburbs of metro Atlanta to the northwest corner of the state, bordering Alabama and Tennessee. As a state legislator, he served on the Task Force for Tax and Fiscal Policy and was also named 2009 ALEC Legislator of the Year.

Rocket Science, continued from page 11

can play in STEM education. Considering our fiscal challenges, we must do everything we can to ensure federal resources are put to the best possible use. Further, as states grapple with new challenges like the implementation of new common standards in math and science, federal programs need to be more responsive to state needs.

Because improving U.S. STEM education is a longterm undertaking, our nation desperately needs a thorough and ongoing public debate on the best overall strategy. No one within our government or the education community is going to be able to develop or implement any kind of plan on their own. We have to work together across party and state lines, across disciplinary lines and across federal agency boundaries.

As fate would have it, remarkably similar proposals are now being developed in Congress by both Republicans and Democrats that explore the best ways to build a more coordinated federal strategy around STEM education goals – one that will combine more evidence-

based decision-making with robust input from STEM stakeholders and on-the-ground educators. Only through such a process can we ensure effective programs are scaled up and underperforming programs are improved or eliminated over time.

Maybe this is an issue we can actually agree on. It's not rocket science.



JAMES BROWN is Executive Director of the STEM Education Coalition. The STEM Education Coalition is an alliance of more than 500 education, business, and professional organizations united in the goal of elevating STEM education as a national priority.

Trademark Counterfeiting: The Real Harms of Fake Goods

BY TRAVIS D. JOHNSON, ESQ., INTERNATIONAL ANTI-COUNTERFEITING COALITION

A GROWING THREAT

Trafficking in counterfeit goods has grown exponentially in the three decades since Congress enacted criminal penalties for this illicit activity. That growth was accelerated by the availability of cheap manufacturing overseas as well as the growth of the online retail market, where criminals make use of the anonymity afforded by the Internet to peddle their knock-offs to unsuspecting consumers looking for a bargain.

In Fiscal Year 2012, the Department of Homeland Security seized over \$1 billion worth of counterfeit goods at U.S. borders that were en route to retail shelves. Unfortunately, those seized goods represent only a small percentage of the total market for counterfeits. By most estimates, global sales of counterfeits now range into the hundreds of billions of dollars, and while counterfeiting has become big business, legitimate manufacturers and consumers pay a hefty price.

Every sale lost to a counterfeiter translates into fewer jobs, less money for capital investment and harm to the reputation a company works hard to build. Consumers, meanwhile, are put at risk by poor quality, substandard goods produced in an unregulated supply chain by individuals who have every incentive to cut corners, even at the risk of harming customer health and safety. As counterfeiters, they have no reputation to protect, as their name is not on the product. And given that those operating in the black market economy are unlikely to be paying any taxes on their ill-gotten proceeds, the entire community suffers in the form of shrinking budgets for essential services and higher taxes on those who play by the rules.

LEGAL IMPLICATIONS

Although trademark counterfeiting is a crime under federal law, and under a variety of state statutes, those laws have lagged behind counterfeiting's explosive growth. Entrepreneurial criminals have discovered that trafficking in counterfeits is often more profitable than trafficking in narcotics, with the added benefit that the penalties are significantly lower if they happen to get caught. In some states, counterfeiting remains only a misdemeanor. Not surprisingly, these factors have made counterfeiting an attractive proposition for organized criminal enterprises and gangs seeking a low-risk, high-reward business. Tougher penalties and ensuring that law enforcement agencies have the necessary resources to give teeth to those laws are both important.

SUPPLY & DEMAND

Consumers also have a role to play. Whether they realize it or not, consumer demand is one factor driving the supply. Of course, most consumers would not knowingly support the criminals who sell these illicit goods, so it is important they be aware of how to avoid (and why to avoid) supporting counterfeiters.


Every sale lost to a counterfeiter translates into **fewer jobs, less money for investment and harm**

to a company's reputation;

consumers are put at risk by poor quality, substandard, unhealthy or unsafe goods.

Some common indicators that consumers should consider are:

- **Price:** A cheap price is not the same thing as good value. If the price seems too good to be true, it probably is.
- **Place:** Is the product sold somewhere you would not normally expect to buy it? If that high-end handbag is offered up by a street vendor or a flea market, it is almost certainly fake. Does that professional-looking website include poorly-written product descriptions (e.g., poor grammar and typos)? Do they have a no-returns or no-refunds policy? If in doubt, trust your instincts.
- **Packaging:** Is the product sold without its original packaging? Are there printing errors, blurry pictures, or typos on the packaging? These can all be indicators that the goods are counterfeit.
- **Personal Protection:** If the business doesn't appear to abide by normal professional standards of marketplace or packaging, it probably also doesn't adhere to professional standards of conduct. Consumers should beware that purchasing from a counterfeit website puts them at risk for identity theft.

Following these tips is a first step consumers can use to help ensure they are buying authentic products and supporting legitimate businesses, rather than unwittingly supporting criminals. 



TRAVIS JOHNSON serves as Vice President – Legislative Affairs and Policy for the International AntiCounterfeiting Coalition (IACC), in Washington, D.C.. Mr. Johnson received his J.D. from the University of Florida with a focus in Intellectual Property Rights. He received his M.A. in Political Management from George Washington University and his B.A. in Political Science from the University of Florida.

The Overfederalization of Crime in America

BY CARA SULLIVAN, JUSTICE PERFORMANCE PROJECT

In March 2013, Anthony Brasfield released a dozen heart-shaped balloons in the air as a romantic gesture for his girlfriend. After a Florida Highway Patrol officer spotted the gesture, Brasfield was charged with polluting to harm humans, animals and plants—a third degree felony punishable by up to five years in prison.

While some criminal laws and sanctions are necessary to protect safety and ensure justice, America's criminal code includes many activities that Americans and business owners have little way of knowing are crimes. As a result, law-abiding individuals and businesses spend innumerable hours and dollars fending off criminal prosecution for actions they never suspected were illegal. There are more than 4,450 federal crimes and 300,000 regulations with criminal sanctions, many of which are duplicative of state criminal statutes and only serve to add confusion.¹ Policymakers at the federal and state levels must ensure there is a legitimate and real need to incarcerate each offender. Further, federal policymakers should carefully consider whether the issue is better handled by the states.

There are more than 4,450 federal crimes and 300,000 regulations with criminal sanctions, many of which are duplicative of state criminal statutes and only serve to add confusion.

Overcriminalization has an enormous economic impact on the business community, as every dollar spent on overly burdensome compliance requirements or legal representation is a dollar that cannot be invested to create new jobs or provide better goods and services to consumers. Overcriminalization also poses indirect costs of lost opportunities for entrepreneurialism, as individuals are discouraged from pursuing business interests.

Beyond the costs to businesses, taxpayers foot the bill for investigating, prosecuting and imprisoning nonviolent individuals who did not intend to commit a crime. There are more than 1.5 million Americans under the supervision of state and federal correctional facilities, at a cost of more than \$30,000 per prisoner every year.² States cannot afford the budgetary costs of imprisoning nonviolent individuals who



acted without criminal intentions, and society cannot afford the human costs of incarcerating individuals who do not need to be imprisoned to protect public safety.

New crimes are unwittingly created every day without full consideration of the impact on the rights of Americans, or the cost to taxpayers and the economy. Incarcerating an individual who had no intent to harm or knowledge that his actions were illegal leads to fiscally irresponsible spending and an inefficient and unjust criminal justice system. Policymakers should reserve precious public safety resources by carefully considering what constitutes criminal actions, and leave many of the decisions on what constitutes a crime to state policymakers.

The American Legislative Exchange Council's new report, *Criminalizing America: How Big Government Makes a Criminal of Every American* is available at www.alec.org/publications/criminalizing-america.



1 Baker, John. "Revisiting the Explosive Growth of Federal Crimes." Legal Memorandum #26. The Heritage Foundation. June 16, 2008. Available at <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>.

2 Henrichson, Christian and Delaney, Ruth. "The Price of Prisons: What Incarceration Costs Taxpayers." Center on Sentencing and Corrections. Vera Institute for Justice. June 20, 2012. Available at http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf.



CARA SULLIVAN is the director of the Justice Performance Project at the American Legislative Exchange Council.

Sentencing Safety Valves Protect Communities and Reduce Costs for Taxpayers

BY GREG NEWBURN, FAMILIES AGAINST MANDATORY MINIMUMS

As prison populations skyrocketed over the past two decades, state spending on corrections rose more than 300 percent. Taxpayers now pay more than \$51 billion annually for incarceration, which represents more than 7 percent of all state general fund spending. With the exception of Medicaid, corrections spending is now the fastest-growing item in state budgets.

In response to the unsustainable fiscal and social costs associated

with unrestrained incarceration, some states have taken the lead to promote common sense, evidence-based criminal justice reforms. Among these reforms is the so-called “safety valve,” which authorizes a court to give an offender less time in prison than is required by an otherwise applicable mandatory minimum sentence. The federal government and about a third of the states now have some kind of safety valve in their laws, and where they have been tried, safety valves have strengthened public safety, saved hundreds of millions of dollars and helped balance state budgets.

In recognition of the success of safety valves at both the state and federal levels, the Justice Performance Project recently adopted the

“Justice Safety Valve Act” (JSVA), a model policy designed to reduce state corrections costs while protecting public safety and reducing recidivism.

The JSVA recognizes prison sentences, even long prison sentences, are often appropriate and effective means of incapacitating violent offenders and deterring crime. However, the principles behind the policy also recognize that alternative sanctions for certain low-level drug and other nonviolent offenders (e.g., shorter prison sentences and “swift and certain” sanctions) can be more effective and efficient than long mandatory minimum prison sentences.

The JSVA allows for departure from an otherwise applicable mandatory minimum sentence if:

- the crime did not involve violence or sexual contact with a minor;
- the court finds the mandatory minimum would create substantial injustice; and
- the court finds the mandatory minimum sentence is not necessary for the protection of the public.

violent and repeat offenders.; and

- finally, they are fiscally responsible. By prioritizing resources and incarcerating people who pose real risks to communities, safety valves help yield the highest public safety return for tax dollars.

The federal government’s safety valve was enacted in 1994 and covers nonviolent drug offenders who meet specified criteria. Since the safety valve enactment taxpayers have saved hundreds of millions of dollars in unnecessary prison costs while the nation’s crime rate dropped to its lowest level in a generation. U.S. Senator Rand Paul (KY) has filed a bill to expand the scope of the federal safety valve, which Senator Richard Durbin (IL) has publicly supported.

Although sentencing reform is traditionally viewed as a liberal idea, conservatives are currently leading the charge for reform. Safety valves have been endorsed by many conservative leaders, including Americans for Tax Reform President Grover Norquist; columnist George Will; R Street Institute President Eli Lehrer; and conservative activist Ward Connerly. Additionally, safety valves have also been

Since the safety valve enactment taxpayers have saved hundreds of millions of dollars in unnecessary prison costs while the nation’s crime rate dropped to its lowest level in a generation. **Over the last decade, 17 states reduced their prison populations while also reducing their crime rates.**

However, even if the above factors are met, the mandatory minimum sentence would still apply to any defendant who:


- has a conviction for the same offense within ten years of the current offense;
- intentionally used a firearm that causes injury to another; or
- is the leader, manager, or supervisor of a continuing criminal enterprise.

To promote transparency and judicial accountability, the JSVA requires the state to monitor the number of downward departures allowed by each sentencing judge. Finally, the JSVA mandates 25 percent of any savings realized as a result of its implementation be earmarked to advance practices proven to reduce recidivism.

Safety valves offer several benefits.

- they reserve scarce prison space for violent and repeat offenders who pose a real threat to public safety and free up resources that can be used in more efficient ways;
- they give courts flexibility to punish offenders appropriately without generating unintended consequences;
- they allow sentencing courts to avoid unjust outcomes and preserve the deterrent and incapacitative effects of incarceration for

endorsed by Heritage Action; Justice Fellowship; the National Association of Evangelicals; and Right on Crime.

Over the last decade, 17 states reduced their prison populations while also reducing their crime rates. State experiences prove we can deliver better public safety at lower costs to taxpayers. The Justice Safety Valve Act provides an excellent model for any state looking to reduce the burden on taxpayers, promote efficiency and accountability in criminal justice and protect public safety. 



GREG NEWBURN is a graduate of the University of Florida and the University of Florida Levin College of Law. He has been FAMM’s Florida Project Director since October 2010. Prior to joining FAMM, Greg worked at the Cato Institute, and taught high school economics and government. He lives in Gainesville, Florida.

Reigning in State Contracts with Private Attorneys: States Deliver Justice and Protect Taxpayers

BY THE HONORABLE LANCE KINZER, KS (HD-30) AND AMY KJOSE ANDERSON, TASK FORCE ON CIVIL JUSTICE

Since the 1990s, state attorneys general offices have been increasingly involved with innovative litigation and have, on occasion, used outside attorneys to spearhead. Sometimes, as in the case of Kansas prior to reform, the choice of contract reeks of cronyism and the public rightly questions the impropriety. Other times, commonly in recent cases, private attorneys create litigation theories and pitch ideas to friendly AGs, inserting the authority of the state office behind the litigation.

When contracts lack oversight and can be dealt out *quid pro quo*, it is difficult to gauge whether litigation is in the best interest of the state and of taxpayers who foot the bill. Private attorneys are understandably incentivized by profit, but when their pay day hinges solely on whether they win, profit can dwarf state and taxpayer interests as the primary driver in litigation. Oversight is essential to realign incentives and keep state AG offices from looking more like Dog the Bounty Hunter than the state's decision-making top cop.

To date, fifteen states have dealt head-on with the easily-abused loopholes in state contracting rules that allow attorney contracts to be settled outside the usual competitive-bidding and request-for-proposal (RFP) processes adhered to in general contracts. Some states have placed public disclosure requirements on outside attorney contracts and limited recoverable contingency fees. Other states have directly placed these contracts under typical RFP requirements and limited the hourly fees of contracted attorneys. The reforms vary from state to state, but they all respond to the same loopholes and fortify oversight in an under-seen area of state contract law (see the map on this page to learn which states have taken action).

When states first began introducing legislation fourteen years ago, the most common arguments made against the reform (usually by those who benefited from the lack of oversight) centered on the inflexibility that would face attorneys general when needing to hire the best counsel for the job. In the one-and-a-half decades since the first state passed this sort of reform, inflexibility has proven to be a flawed argument. Where merited, state AGs can still bring in the outside counsel most suitable to help with litigation, and it is arguable that states have gotten better deals. Sunshine is the best disinfectant, and where the public can play a watch-dog role, state contracts have been less likely to be doled out *quid pro quo*.

Kansas is just one state that has had great success with reform, receiving approval from sitting Attorney General Derek Schmidt and appreciation from the public.

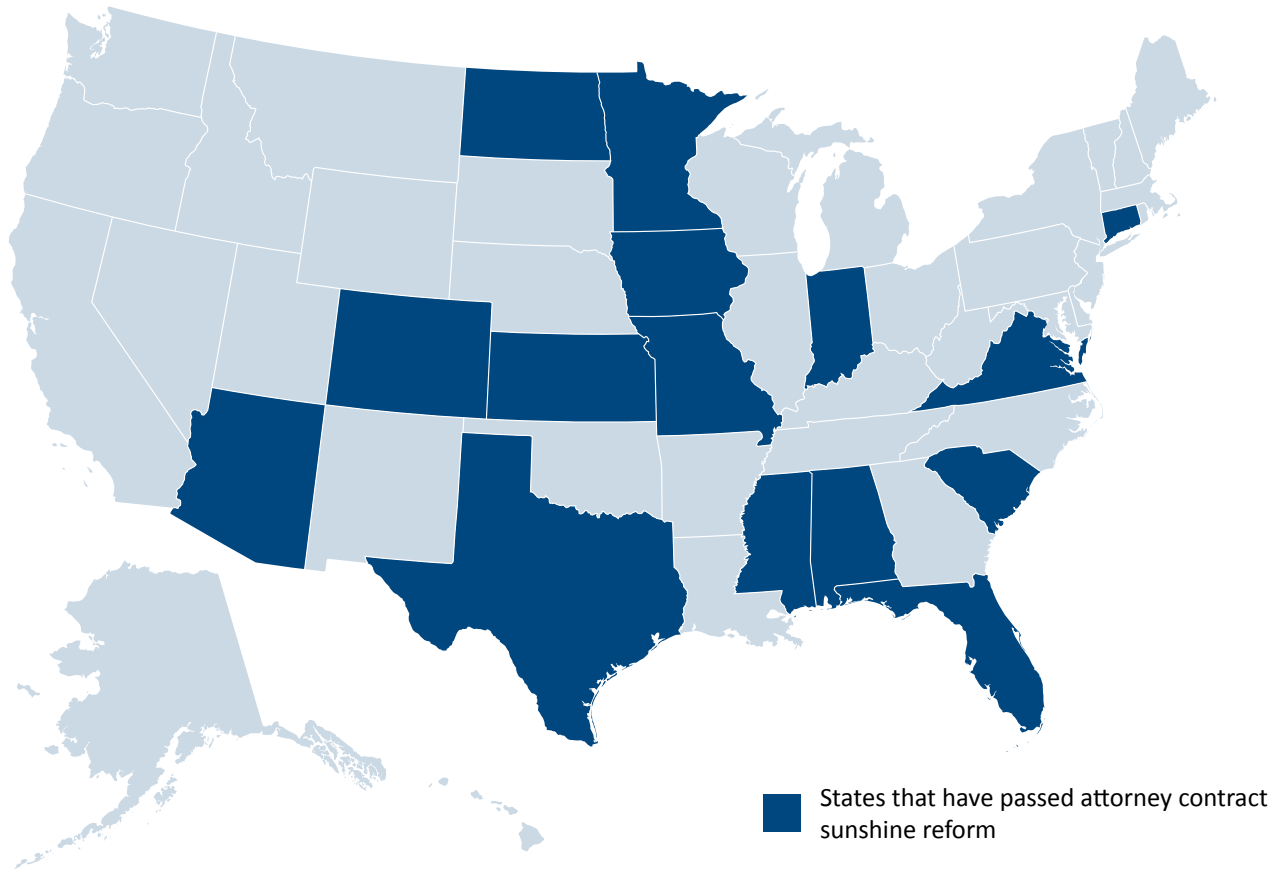
GOING STRONG A DECADE LATER: KANSAS AND THE PRIVATE ATTORNEY RETENTION SUNSHINE ACT

The Kansas Professional Services Sunshine Act was passed in 2000, based on ALEC model policy. The legislation was introduced after then-Attorney General Carla Stovall decided to hire her former law firm to represent the state in tobacco litigation. The firm earned millions of dollars in fees for what many viewed as little to no work. Attorney General Stovall vigorously defended her conduct and made no apology, arguing that her actions were "obviously the right decision." Many Kansans disagreed, and indeed some traced her surprise decision not to run for Governor in 2002 back to this controversy.

Oversight is essential to realign incentives and keep state AG offices from looking **more like Dog the Bounty Hunter than the state's decision-making top cop.**

Faced with what appeared to many to be cronyism in the retention of contract counsel, legislators led by then-State Representative Tony Powell, pursued three goals: to require a negotiated bid process for state agencies that hire outside counsel; establish a process for challenging the reasonableness of attorney fees charged to the state; and eliminate contingency fees for contract attorneys. Ultimately the votes were not there to entirely do away with contingency contracts, but Kansas statute does now establish clear guidance for state agencies that contract for legal and other professional services.

The Kansas statute distinguishes between contracts of less than \$25,000 (subject to limited negotiation and reporting requirements under most circumstances), contracts for \$25,000 to \$999,999 (subject to competitive bidding through a statutorily defined procurement negotiating committee under most circumstances), and contracts of \$1,000,000 or more (where, in cases where the state is plaintiff, a




formal request for proposal process is mandated as well as significant legislative oversight). The law also includes detailed standards for court approval of contingency fee amounts, and a process for individuals to challenge such fees.

The current attorney general has worked to reduce reliance on outside contract counsel, retaining them only when truly required (e.g., the office has a conflict, the case involves specialized expertise, the nature of the case will cause it to be resource-intensive and have the effect of unreasonably diverting in-house resources from other cases, etc.). But it is still not at all uncommon for the provisions above to be triggered at one level or another. In FY 2011, the prior Attorney General entered into 23 outside contracts for legal services, and in FY 2012 and FY 2013 only 8 such contracts were entered into each year, one of which met the \$1,000,000 threshold. Given the balance of flexibility and accountability built into the statute, it is certainly fair to say that the Kansas Professional Services Sunshine Act has worked satisfactorily to achieve its clear goal of restoring public confidence in a system that was called into serious question over a decade ago.

BEYOND KANSAS

The majority of states still allow private attorneys to bring state litigation without oversight and accountability. Enterprising attorneys can still win state buy-in (and payment) on innovative litigation without the public being any the wiser. State legislators would do well to follow the Kansas' example and allow the public their watchful role to preserve trust in the state's attorney general office. States that have

passed this voter-supported, good-government reform have seen the added benefit of improved business activity. Where litigation is appropriate, businesses have the confidence to invest in the state economy. In a 2009 econometric study by the Pacific Research Institute and economist Lawrence McQuillan, this single reform was measured to improve economic prosperity by reducing unnecessary losses in the lawsuit system by twelve percent.

Read more on this key reform in ALEC's, *Lawsuit Reform for Competitive State Economies*. The report highlights this reform and many other good-government reforms aiming to eradicate unfair litigation. Contact the Task Force on Civil Justice for additional research. 



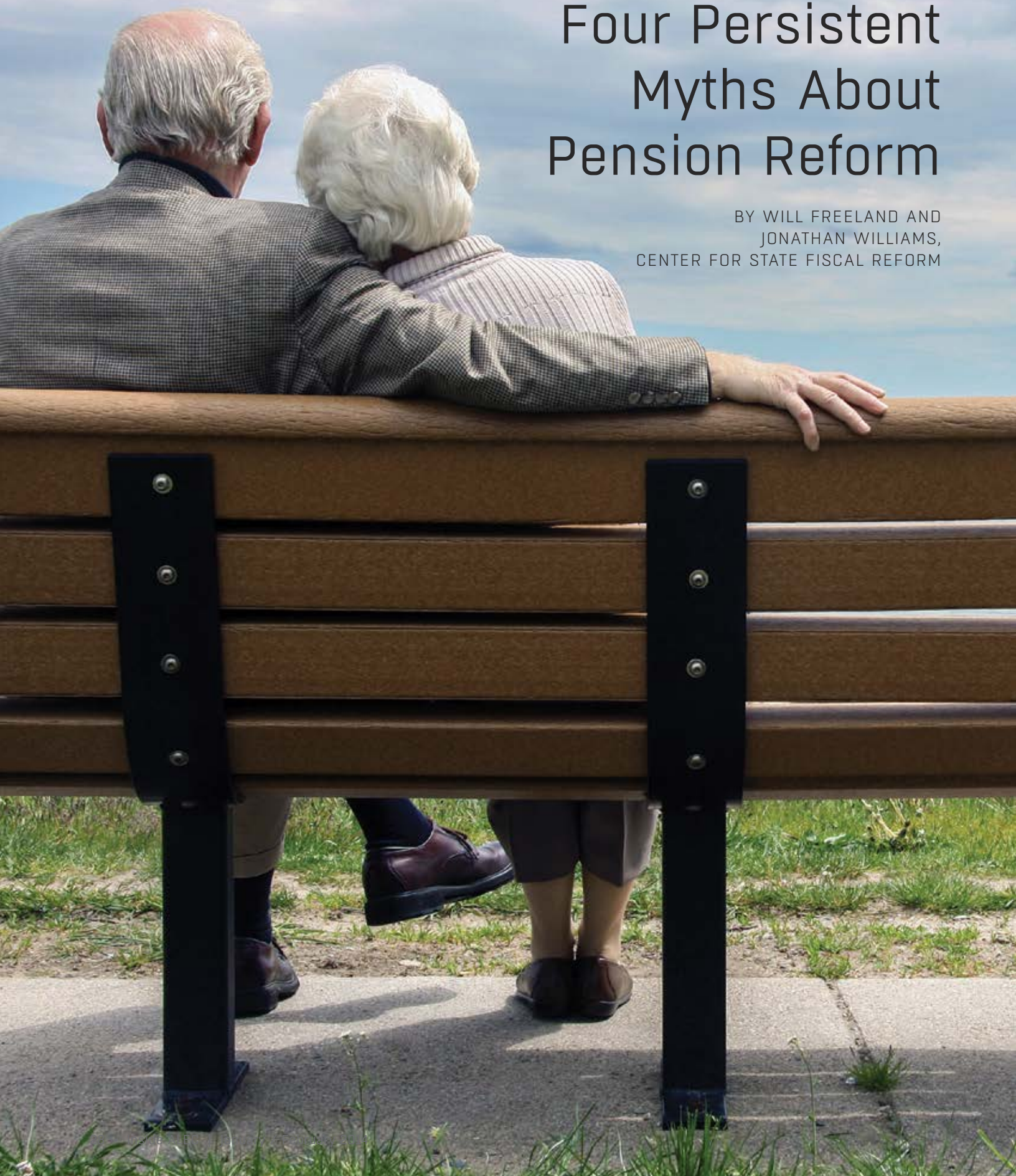
THE HONORABLE LANCE KINZER (HD-30) chairs the Kansas House Judiciary Committee and serves as ALEC's Public Sector Chairman of the Task Force on Civil Justice.



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Four Persistent Myths About Pension Reform

BY WILL FREELAND AND
JONATHAN WILLIAMS,
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Pension reform has swept the nation, and not a moment too soon, given the debt, fiscal stress, financial instability and even U.S. Securities and Exchange Commission fraud charges, precipitated by underwater pension systems. Reports estimate total unfunded pension liabilities exceed \$4 trillion across the 50 states. As cities and states struggle to pay for employee legacy costs, fund the essential functions of government and attempt to keep taxes competitive, more policymakers—Democrat and Republican, liberal and conservative—are reconsidering how to provide a secure retirement for state and municipal employees in a responsible manner. With discussion of reform have come thoughtful criticisms, but also many polemics built on misconceptions, “strawman” arguments and complete myths.

MYTH 1: PENSION REFORM IS BASED ON PARTISAN POLITICS:

Opponents of pension reform often cite partisan politics and ideology as driving forces behind efforts to repair underfunded retirement systems, but this couldn’t be further from the truth. Reform plans are modest, suggesting policymakers move from highly unpredictable defined benefit plans, where the state or city government acts as a bank or investment funds for retirement, and instead give employees specific contributions to hold in their own retirement account, much like the 401k retirement plans most private sector employees have.

MYTH 2: THE STATUS QUO IS FINE; WE JUST NEED TO BETTER MANAGE THESE PLANS TO BE SUSTAINABLE:

The reasons pension liabilities increased to \$4 trillion in debt across the states are simple and largely uniform. Politicians are incentivized to overpromise employee benefits for a short-term boost in political support, while pushing the cost of those enhanced benefits into the future. Pension debt accumulates under this underfunding-overgiving incentive dynamic, and is compounded by the unreasonable investment return assumptions and risky investing states rely on to make up for pension underfunding.

Pension debt crowds out provisions for public services, harms tax competitiveness and forces municipalities (and perhaps soon, states) into bankruptcy. Avoiding this debt requires fundamental pension reform rather than hoping policymakers will make sound decisions in the future, ignoring their poor track record.

MYTH 3: PENSION REFORM IS ANTI-WORKER AND MEANS SHRINKING BENEFITS, STAGNANT PAY AND STRIPPING PEOPLE OF THEIR RETIREMENT:


Moving to a defined contribution plan doesn’t strip employees of retirement or even cut retirement benefits—it protects their nest egg. What does strip people of their pensions is municipal bankruptcy. Defined contribution plans help prevent bankruptcy, and in the case it still occurs, those employees’ plans remain outside the city’s finances and safe from bankruptcy judges. Moreover, pension debt squeezes current revenue without providing current benefits to taxpayers, leading to stagnant public spending across the board, including worker compensation in the areas of health care and wages.

MYTH 4: DEFINED CONTRIBUTION PLANS LEAD TO RISKY INVESTMENTS, LARGE TRANSITION COSTS, AND HIGH MANAGEMENT FEES:

Prudent state pension administration can easily avoid high management fees and overly risky investing. These features are among the reasons the private sector has overwhelmingly chosen these plans over administering their own pension systems. Further, the actual costs of switching to a defined contribution system are minimal, especially once on-paper accounting recalculations of already incurred debt are rightly ignored. Defined contribution plans can be safe from undue risk, exorbitant cost and unreasonable complexity.

Pension reform should not be viewed as a story of warring views of government or society, but rather **a bipartisan and broad ideological coalition of responsible citizens, watchdogs and policymakers standing up and choosing viable public employee retirement policy.**

THE PATH FORWARD:

Pension reform should not be viewed as a story of warring views of government or society, but rather a bipartisan and broad ideological coalition of responsible citizens, watchdogs and policymakers standing up and choosing viable public employee retirement policy. Divisive myths about pension reform distract from the task at hand: protecting retirement security for our public servants, while ensuring government can provide necessary services and maintain tax competitiveness without saddling our children with crippling debt. 



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Space Exploration: A Pathway to the Stars and Economic Growth

BY ROSS GARELICK BELL, MRGB CONSULTING

Exploration and innovation fuel economic growth and a country's ability to assume risk on a scale that industry cannot and opens doors to unknown, but often vital, business opportunities, like GPS and communication satellites. With sequestration, concerns about government spending and government shutdowns, we must determine as a nation if exploration and funding the National Aeronautic and Space Administration (NASA) are necessities or luxuries.

Since 1958, NASA has led America's exploration efforts. NASA has maintained a continuous human presence in space for 13 years aboard the International Space Station; landed on other planets; captured space dust; and launched systems that have traveled millions of miles over decades without losing contact, needing repair, or missing their destination. Weight, material, vehicle integrity and energy conservation in extreme environments are critical components in developing spacecraft and aeronautical vehicles. The resulting spinoff technology from NASA's rigorous requirements has been woven into the fabric of things we use daily.

NASA Spinoffs, an annual publication that highlights NASA technology leading to improvements in the marketplace, has tracked more than 1,700 tangible items over the years, including these notables:


- NASA technology to capture images in space helped develop small, high-resolution cameras now found in one of every three cell phones;
- lightweight, heat-resistant material to protect astronauts upon atmospheric re-entry is used in NASCAR racecars to protect drivers;
- shuttle designs led to blended airliner jet wingtips that reduce drag and fuel consumption, resulting in billions of gallons in fuel savings, according to manufacturer Aviation Partners Boeing;
- Dryden Flight Research Center wind resistance studies on early space shuttles and aeronautic vehicles led to streamlined designs for the nation's trucks and tractor trailers, improving fuel efficiency by 25 percent and decreased drag by 52 percent;
- robotic technology developed to repair the International Space Station is now commonly used in hospitals for minimally invasive surgeries like knee replacement; and
- significant improvements to police and military body armor with material developed to protect the Mars Rovers during landing.

NASA technology is everywhere, providing benefits to states and the private sector.

On Feb. 24, 2011, at 4:53:24 p.m., I, along with one million other Americans, witnessed the final launch of the Space Shuttle Discovery,

STS-133, at Cape Canaveral, Florida. This event was inspiring. In one split-second the force of exploration, the dynamics of science, and the beauty of engineering created a perfect synergy to remind us what is achievable and what is possible.

Dr. Neil deGrasse Tyson, before the United States Senate Committee on Commerce, Science, and Transportation on Mar. 7, 2012 argued that “exploration of the unknown might not strike everyone as a priority. Yet audacious visions have the power to alter mind-states—to change assumptions of what is possible. When a nation permits itself to dream big, those dreams pervade its citizens’ ambitions. They energize the electorate...Epic space adventures plant seeds of economic growth, because doing what’s never been done before is intellectually seductive (whether deemed practical or not), and innovation follows, just as day follows night. When you innovate, you lead the world, you keep your jobs, and concerns over tariffs and trade imbalances evaporate. The call for this adventure would echo loudly across society and down the educational pipeline.”

As Dr. deGrasse states “How much would you pay to launch our economy? How much would you pay for the universe?” The U.S. Space Program, a government agency, is one of the greatest manifestations of American exceptionalism. 




ROSS GARELICK BELL has policy experience at the local, state, federal, and tribal levels and is the Managing Partner in his firm, MRGB Consulting, specializing in aerospace, defense, appropriations, cyber security, energy, environment, and Native American issues. He recently completed the International Space University’s Space Odyssey Institute held in conjunction with The George Washington University Space Policy Institute. Mr. Garelick Bell held a gubernatorial appointment to the Virginia-Israel Advisory Board and has served on the Alexandria Environmental Policy Commission and the Alexandria Waterfront Committee.

STEM Challenge, continued from page 10

Here are five places to start:

- **Personalizing instruction for individual needs.** Today’s new technologies and promising charter school models, like Rocketship Education in California or Carpe Diem in Arizona, highlight opportunities to customize curricula and instruction. New York City’s School of One has shown how new technologies make it possible to personalize math instruction by adopting a “customized playlist” approach in which students are assigned each day to the learning objectives that are most appropriate for their level of performance.
- **Rewriting the teacher’s job description.** Talented STEM majors can command a much higher wage in the private sector than in schools. One solution is to rethink teaching jobs which lock out professionals who may be eager to teach but not to become full-time teachers. Think of how community colleges make extensive use of professionals who are employed full-time elsewhere. Boston-based Citizen Schools, for instance, provides highly regarded after-school instruction and career-based learning by creating opportunities for local professionals to instruct students on a part-time basis. The private sector can support such ventures and permit (or even encourage) their employees to participate while supporting district efforts to adopt such arrangements.
- **Getting more value out of great teachers.** It is an enormous challenge to recruit enough terrific math and science educators. While merit pay plans are a sensible part of rewarding and retaining excellent STEM teachers, reformers should also consider ways to more fundamentally differentiate teacher roles while permitting the best teachers to be more productive. Rather than ask every teacher to teach the same material to the same number of children, talented STEM teachers should be encouraged and rewarded if they are willing to work with more students in expanded roles.

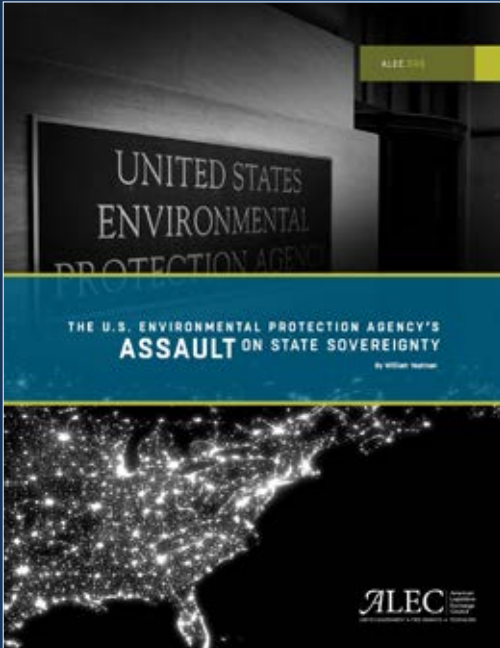
- **Carving new paths to teaching.** Preparing STEM teachers requires more than simply tinkering with today’s schools of education and licensure systems. High Tech High School in San Diego, for instance, has sidestepped the licensure hurdle by becoming a state-recognized teacher preparation institution.
- **Leveraging the power of technology.** Just a few decades ago, technological limitations meant that students could be taught only by a teacher who was physically present in their school. This was particularly limiting for rural or urban schools, which tend to have difficulty attracting enough talented STEM instructors. Today, new technologies have made it possible to share expertise and instruction across great distances, making dramatic advances in STEM instruction possible everywhere. It is now possible, for example, to use tutors from around the globe to provide real-time, intensive instruction to students 24 hours a day, seven days a week.

Those seeking a STEM revolution cannot settle for comfortable tweaking. Too often, STEM reform has entailed well-intentioned efforts to superimpose good ideas on a rickety, aged set of institutions and organizations. If today’s earnest efforts are to deliver more than that, then good intentions and thoughtful proposals must be joined by a fierce commitment to remaking America’s schools for the 21st century. 



FREDERICK M. HESS is director of education policy studies at the American Enterprise Institute and lead author of the U.S. Chamber of Commerce report, “The Case for Being Bold: A New Agenda for Business in Improving STEM Education.”

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